Supreme Court, U.S.
FILED

96 55 MAY 7 1996

NO. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

BAYSHORE NATIONAL BANK OF LA PORTE, Petitioner

v.

DEAN RAY EVANS & JANE ELAINE EVANS, Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

****

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

****

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LAPORTE

52 pp

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U.S. COURT OF APPEALS
FILED
FEB 07, 1996
CHARLES R. FULBRIDGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-20421

In The Matter of: DEAN RAY EVANS; JANE ELAINE EVANS

Debtors

BAYSHORE NATIONAL BANK OF LA PORTE,

Appellant,

v.

DEAN RAY EVANS; JANE ELAINE EVANS,

Appellees.

Appeal from the United States District Court
for the Southern District of Texas

Before KING, DAVIS, and BARKSDALE, Circuit Judges. PER CURIAM:

Bayshore National Bank of La Porte appeals the district court's affirmance of the bankruptcy court's discharge of Dean

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• Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

Ray Evans and Jane Elaine Evans in Chapter 7 bankruptcy. By focusing on the Evanses' transfer of nonexempt assets into their exempt homestead, Bayshore sought to bar the Evanses' general discharge pursuant to 11 U.S.C. § 727(a)(2) and to impose an equitable lien on their homestead pursuant to the Texas Fraudulent Transfers Act. Tex. Bus. & Com. Code §§ 24.005 and 24.008. The bankruptcy court granted summary judgment in favor of the Evanses on all causes of action regarding the homestead. Because we find that Bayshore did not submit sufficient summary judgment evidence as to the Evanses' intent to conceal the transfers, or to hinder, delay, or defraud, and because the transfers did not occur within one year of the Evanses' bankruptcy filing, we conclude that the district court did not err in affirming the bankruptcy court's summary judgment.

By focusing on the transfer by Dean Ray Evans of two cashier's checks to Texas Coastal Bank ("TCB"), Bayshore sought to bar the Evanses' general discharge pursuant to 11 U.S.C. § 727(a)(2) or, alternatively, to have the debt to

Bayshore declared nondischargeable pursuant to 11 U.S.C. § 523(a)(6). After trial on the merits, the bankruptcy court found that D. Evans' transfer of the cashier's checks was a preferential payment and not a transfer made to hinder, delay, or defraud creditors. The record supports that finding. Additionally, the bankruptcy court determined that Bayshore had no cause of action under § 523(a)(6) because Bayshore had no legal claim to the cashier's checks at the time that D. Evans transferred them to TCB. We agree with the lower courts that, on the facts presented, the transfer of the two cashier's checks to TCB did not justify denial of discharge under § 523(a)(6).

For the foregoing reasons, we AFFIRM the judgment of the district court.

UNITED STATES DISTRICT COURT
SOUTHER DISTRICT OF TEXAS
ENTERED
SEPT. 25, 1995
MICHAEL MILBY,
CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BAYSHORE NATIONAL BANK OF LA PORTE,	§	
	§	
	§	Michael N. Milby, Clerk
Appellant,	§	
	§	
v.	§	CIVIL ACTION
	§	NO. H-93-4099
	§	
DEAN RAY and JANE ELAINE EVANS	§	
	§	
	§	
Appellees.	§	

ORDER

Pending before the Court is the appeal (Docket Entry #8) entered by BAYSHORE NATIONAL BANK OF LA PORTE ("Appellant") from the judgment of the United States Bankruptcy Court for the Southern District of Texas in Adversary No. 92-4113. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. § 158.

On November 2, 1993, United States Bankruptcy Judge William Greendyke entered Judgment (Bankruptcy Dkt. #77) from which the Appellant appeals. After considering pleadings, the record filed in the above-captioned matter the record of the bankruptcy proceedings and the applicable law, this Court finds that the Judgement entered by the United States Bankruptcy Court in this matter should be AFFIRMED.

It is so ORDERED.

The Clerk shall entered this Order and provide a true copy to all parties.

Signed this 24th day of April, 1995.

/s/ John D. Rainey

JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

C:\WORD5\BRKPPLD\0915JF01

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
NOVEMBER 03, 1993
Michael N. Milby, Clerk
By Deputy:
/s/ S. Guevaun

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE :	§	CASE NO.
	§	91-49239-H4-7
	§	
DEAN RAY EVANS and	§	CHAPTER 7
JANE ELAINE EVANS,	§	PROCEEDING
	§	
Debtors	§	
	§	
BAYSHORE NATIONAL	§	ADVERSARY NO.
BANK OF LA PORTE,	§	92-4113
	§	
Plaintiff	§	
	§	
DEAN RAY EVANS and	§	
JANE ELAINE EVANS,	§	TRUSTEE: HENSLEY
	§	
Defendants	§	JUDGE: GREENDYKE

FINAL JUDGEMENT

FINAL JUDGMENT

At said district came on for consideration the above-styled adversary case, and the Court, after considering the arguments of counsel, prior motions, orders by the Court, admissible judgment evidence, and after the submission of material disputed facts to a trial before the Court,

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that:

1. All causes of action brought by Bayshore National Bank of La Porte ("Bayshore") under 11 U.S.C. §727(a)(2) regarding the transfer of assets by Dean Ray Evans for the purchase of an allowed homestead are DENIED on the basis that such transfers did not occur within one year of the November 19, 1991 bankruptcy filing date.

2. All causes of action brought by Bayshore under 11 U.S.C §727(a)(2) against Dean Ray Evans regarding the

commencement of a lawsuit against Bayshore National Bank of La Porte are DENIED.

3. All causes of action brought by Bayshore under 11 U.S.C. §727(a)(2) against Dean Ray Evans relating to two cashier checks alleged to have been obtained by Defendant Dean Ray Evans are DENIED.

4. All causes of action brought by Bayshore against Dean Ray Evans under 11 U.S.C. §727(a)(3) are DENIED.

5. All causes of action brought by Bayshore against Dean Ray Evans under 11 U.S.C. §727(a)(4) are DENIED.

6. All causes of action brought by Bayshore against Dean Ray Evans under 11 U.S.C. §727(a)(5) are DENIED.

7. All causes of action brought by Bayshore against Dean Ray Evans under 11 U.S.C. §523(a)(2) are DENIED.

8. All causes of action brought by Bayshore against Dean Ray Evans under 11 U.S.C. §523(a)(4) are DENIED.

9. All causes of action brought by Bayshore against Dean Ray Evans under 11 U.S.C. §523(a)(6) including that relating to two cashier checks allegedly obtained by Dean Ray Evans are DENIED.

10. All causes of action brought by Bayshore against Dean Ray Evans pursuant to the Texas Uniform Fraudulent Transfer Act, Tex. Bus. & Com. Code §24.001, *et seq*, are DENIED.

11. All causes of action brought by Bayshore against Jane Elaine Evans under 11 U.S.C. §727(a)(2) regarding the transfer of assets by Jane Elaine Evans to purchase an allowed homestead are DENIED on the basis that such transfers did not occur within one year of the November 19, 1991 bankruptcy filing date.

12. All causes of action brought by Bayshore against Jane Elaine Evans under 11 U.S.C. §727(a)(2) regarding the commencement of a lawsuit against Bayshore National Bank of La Porte are DENIED.

13. All causes of action brought by Bayshore against Jane Elaine Evans under 11 U.S.C. §727(a)(2) relating to two cashier checks alleged to have been obtained by Dean Ray Evans are DENIED.

14. All causes of action brought by Bayshore against Jane Elaine Evans under 11 U. S.C. §727(a)(3) are DENIED.

15. All causes of action brought by Bayshore against Jane Elaine Evans under 11 U.S.C. §727(a)(4) are DENIED.

16. All causes of action brought by Bayshore against Jane Elaine Evans under 11 U.S.C. §727(a)(5) are DENIED.

17. All causes of action brought by Bayshore against Jane Elaine Evans under 11 U.S.C. §523(a)(2) are DENIED.

18. All causes of action brought by Bayshore against Jane Elaine Evans under 11 U.S.C. §523(a)(4) are DENIED.

19. All causes of action brought by Bayshore against Jane Elaine Evans under 11 U.S.C. §523(a)(6) including that relating

to two cashier checks allegedly obtained by Dean Ray Evans are DENIED.

20. All causes of action brought by Bayshore against Jane Elaine Evans pursuant to the Texas Uniform Fraudulent Transfer Act, Tex. Bus. & Com. Code §24.001, *et seq*, are DENIED.

21. Costs of Court are adjudged against Bayshore National Bank of La Porte.

22. Final Judgment is GRANTED in favor of Dean Ray Evans and against Bayshore National Bank of La Porte.

23. Final Judgment is GRANTED in favor of Jane Elaine Evans and against Bayshore National Bank of La Porte.

24. The Clerk of the Court shall issue the Order of Discharge for Dean Ray Evans.

25. The Clerk of the Court shall issue the Order of Discharge for Jane Elaine Evans.

26. This is a Final Judgment.

SIGNED the 2nd day of November, 1993.

/s/ William Greendyke
WILLIAM GREENDYKE
UNITED STATES BANKRUPTCY JUDGE

APPROVED AS TO FORM:

/s/ James C. Fogo
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/s/ Mynde S. Eisen

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ATTORNEY FOR PLAINTIFF
BAYSHORE NATIONAL BANK OF LA PORTE

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

BAYSHORE NATIONAL BANK	§	CASE NO. 92-4113-H4-ADV.
VERSUS	§	HOUSTON, TEXAS
DEAN RAY EVANS	§	SEPTEMBER 15, 1993 9:32 TO 12:20 O'CLOCK P.M.

TRIAL

BEFORE THE HON. WILLIAM GREENDYKE, UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Plaintiff:

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P. O. Box 630749
Houston, Texas 77263

For the Defendant:

JAMES CHARLES FOGO, ESQ.
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Houston, Texas 77074

Court Recorder:

BRENT LASWELL

PREPARED BY:
JUDICIAL TRANSCRIBERS
OF TEXAS, INC.
7035 West Tidwell
Building J, Suite 109
Houston, Texas 77092
(713) 462-6434

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

THE COURT: Ms. Eisen, I want to try and make some findings. I don't know that there's going to be a whole lot more that either one of you are going to tell me that's going to push me over the edge, legally, today.

My approach to 523A6 is as I described by means of an example earlier has been a tort approach. I've had people argue to me that if somebody does something wrong with the creditor's collateral, that the entire amount of the debt becomes nondischargeable. I don't think that's appropriate, and I've ruled that way many times in the past, that the amount of nondischargeability, if you will, under 523A6 is based upon the amount of damage that results from the wrongdoing. It's — My label is a tort approach.

My question to you earlier centered around what right did Bayshore have to the money so that we had a tort being committed. One of the principles of 523A4, and I'll make another analogy to you somewhat esoterically, is that your trust agreement had to predate or precede the breach that you're

complaining of so that you can't have a trust resulting from the act that you're complaining of and have that float for purposes of nondischargeability. You have to have a preexisting trust relationship and obligation and then a breach so that you don't have a constructive trust liability or purchase money or resulting trust liability. There's got to be a trust fund set up, a trust obligation by state law or by, whatever, or by formal agreement, and then a subsequent breach of that fiduciary responsibility.

In this instance, the complaint that you're making is that the tort is a preference payment. It's sort of the same way. You don't have a preexisting arrangement. You don't have a preexisting duty in my mind that he is ignoring. You don't have a tort. You don't have something that he has done wrong separate and apart from the obligation centering around preference payments.

That remedy, that preference remedy, is a bankruptcy remedy. In the absence of the filing of the bankruptcy case, you wouldn't have the similar right under state law. I mean, I know we wouldn't be talking about dischargeability in the

absence of a bankruptcy case, but you don't have a separate tort. You just have an asset that you're trying to collect.

Based upon what I've seen, I think, as a matter of law, now, there's no 523A6 cause of action. I'm going to find as we mentioned in the argument that we — that the Debtor, obtained cashier's checks in the total amount, approximately, of $33,000, partially in January of 1989 - I believe that's the right month - and July of 1990. He maintained those. I think the purpose of keeping those checks was not just to keep them separate from his other funds, but was to keep them from his creditors obtaining those monies. I believe that. I believe there was enough going on in his life for me to feel comfortable in finding that he was trying to preserve that money, just like it was a cash equivalent, which it was, that he was keeping out of banks, whatever.

The one-year period occurred or rolled up or accrued, and he still was keeping those funds in his back pocket, figuratively speaking. A Judgment was taken by Bayshore in February of - I believe it was February —

MS. EISEN: 1991.

THE COURT: What is the date of the Judgment?

MS. EISEN: February 26, 1991.

THE COURT: Okay. February of 1991. I have some problem in finding that he was unaware of the Judgment. I mean, I heard his testimony. I'm more troubled by the lack of reaction, if you will, to the knowledge of the Judgment, that he testified about. And that's why I asked him questions about it. My dealing with people like Mr. Evans for a number of years and just people in general, I find it incomprehensible that somebody could have $400,000 Judgment taken against him and not wring some lawyer's neck if he didn't know about it. I mean, that's human nature. Maybe Mr. Evans is the most forgiving person in the whole world, I don't know. I find that a little incredible, and I have the right to make that finding and the prerogative to make that finding. So I'm troubled by that.

I don't think it's particularly relevant, but I wanted to touch upon it since we have so much about it. So during the one-year period commencing in November of 1990 up until

the time of the garnishment, we're still in a holding pattern with regard to the money. We're still keeping it in our back pocket, if you will.

I'll also find that there is no real opportunity during that one-year period for him to disclose the existence of the money to Bayshore. No one has made me aware of any discovery. No one has made me aware of any request for Financial Statements or any responses that needed to be made under oath, or at all, where he misrepresented or kept from them when asked any kind of question, the existence of those funds. He's saving it in a very peculiar manner, basically.

The garnishment gets filed. He becomes aware of the garnishment. He then at that point goes to Texas Coastal and is obviously worried about the status of his cashier's checks in light of the garnishment, since his cashier's checks were issued by Texas Coastal. So he asks first whether or not they will cash the checks, and they say no. His second choice is to apply it to the Texas Coastal debt, which is, coincidentally, in about the same amount as the two checks combined. His

guaranty liability on the Nail loan and his car note, interest and principal is about the same.

Apparently they take the checks at that point, and everybody comes clean. Here they are. They filed the Amended Answer to the garnishment. The bank, Texas Coastal, makes everyone aware, obviously, with the consent and ratification of the Debtor, that the checks are there. And Texas Coastal holds them. Ostensibly, there's some legal activity or some negotiations in the interim from July until November of 1991. Nothing happens to the money. The bankruptcy case gets filed in our one year period of November the 16th, or whatever it is, gets determined. And I'll take notice of the docket for the date of filing of the case, and I may have the date wrong, but I'm close enough.

The Debtor discloses the existence, formally, many times in his bankruptcy filings. There is no attempt to conceal beyond July 22nd of 1991, and, in fact, there's multiple items of revealment, if you will, of the existence of the checks. The money is turned over to the bankruptcy estate after demand is

made, and a compromise is filed, and we approve. And I'll take notice of my exhibits here and also the contents of my main case docket.

The transfer, in my mind, to Bayshore — or to Texas Coastal of the cashier's checks was a preference payment. He preferred one creditor over another when he turned the money over. His first choice was to keep the money. He attempted to get cash, and there was no evidence of what he would have done with that cash, however relevant that might have been; but that didn't work out. So we don't have a verb at that point for taking the money and doing something with the cash.

The only thing he did do was he gave the checks over to Texas Coastal. So, to that extent, you know, literally, there was a transfer to them. But I think the transfer was a preference transfer in my mind.

I think, ma'am, you have an intent, as I said before, to keep this money from creditors. My problem is with the verb. My problem is, is that I don't think that this fits under, for

purposes of barring the man's discharge, classical examples of transfers in hindrance of creditors. It's a preference transfer and not a transfer in hindrance of creditors. You know, there may be a case out there that says that a preference payment, preferring one creditor over another, is one that satisfies that requirement. I just don't see it.

The transfer that I'm thinking of is the transfer to the daughter or to the mother or to the business partner in the Caymen Islands, or something like that, to get the money out of the hands of another creditor. The existence of the debt in the hands of Texas Coastal in the same amount, basically, as the cashier's checks, ameliorate that effect, lessen that effect to some extent.

I'm also troubled by the fact that it is a preference type payment and that remedy, that situation, is one which a remedy exists under bankruptcy law; so, in effect, the money is coming back. I'm going to find for intent, but I'm going to deny relief because I don't think you have the proper type of transfer, and the Debtor has, in effect — the situation has remedied itself.

I don't know that I want to invite further briefs. I feel — you may want to tell me that I'm wrong. You may just want to take the whole thing up.

MS. EISEN: What I would like to do is see if you — I would like a finding on that Texas Coastal Bank was an insider by virtue of his being a director on the bank, or at least a finding that he was a director -

THE COURT: An insider under what definition?

MS. EISEN: That — Well, or just even a finding that he was a director of the bank.

THE COURT: Oh, I'll find that he was a director of the bank. I'll find that he did not -

MS. EISEN: And the -

THE COURT: — attend any meetings during -

MS. EISEN: '92.

THE COURT: — 1992, but he was an active director per his own testimony in '91 and '92 and has only recently resigned as a director of the bank.

MS. EISEN: And I'd also like a finding on the record I that the testimony showed that he was current on — that he resumed payments on the notes to Texas Coastal Bank.

THE COURT: When?

MS. EISEN: I don't remember exactly what he testified to.

THE COURT: There was some equivalent testimony -

MS. EISEN: Shortly after the bankruptcy, he testified.

THE COURT: — equivocal testimony about his payments.

MS. EISEN: On -

THE COURT: I think the payments are now current. I think there was some gap in the payments. I -

MR. FOGO: Your Honor, I believe the testimony is that there was a gap in the payments, and he resumed payments on the car loan, and that was — his testimony was that the loan was refinanced and renewed.

THE COURT: This is all after the date of filing, though; right?

MR. FOGO: Correct.

THE COURT: So as of July of -

MS. EISEN: He was -

MR. FOGO: '91.

THE COURT: — '91, he was current.

MS. EISEN: He was current.

THE COURT: Can we stipulate to that? After the date of the garnishment, he was current. Everything was fine with Texas Coastal.

MR. FOGO: That's fine. That those common law pledge remedies are well entrenched in state law, Your Honor, that banks have that interest.

THE COURT: He still owes money to the bank. There's no doubt about it, but the loans — we have no evidence that the loans were in default in July of 1991 at Texas Coastal Bank. That's a fair finding. I don't think we talked about that. All right. Anything else?

MR. FOGO: May I draft the Judgment then, Your Honor?

THE COURT: Yes. Per our prior discussions, I think it

ought to incorporate what we've done previously and go up. I don't really want to make any further findings and conclusions. I think I've been pretty verbose, and it's been pretty short and sweet, based on the way you've pitched it. I'll rely upon my verbal findings and conclusions and will sign a formal Judgment denying the relief requested and allowing the discharge to go forward, subject to whatever motions you might file.

My preference if you're going to try and stop the entry of the discharge is that you just go ahead and tell the District Court to stay entry of the discharge and that I have had told you not to even bother coming through me. I usually decline not to stay execution or enforcement of my judgments because one of the findings I need to make is that you're likely to flip me on appeal, and I don't think that that's — so I'd just as soon you go to the District Court with my blessing and see if you can I convince them to go ahead and stop entry of discharge, if that's what you want to do.

MS. EISEN: Your Honor, if we do appeal, I was going to file a motion to reconsider the Summary Judgment because,

obviously, the new case law that's come out, but I can do that on the appellate level and just take the whole thing up -

THE COURT: I'm not telling you not to tell me to reconsider, but I have no idea what you're talking about and would rely upon you. If you want to ask me to reconsider, have at it, and tell me what the law is. Don't do it just for the sake of wasting your time or, you know, making a predicate, preserving your right to appeal. If I'm wrong on the law, I want to know about it. And I made some assumptions here about the transfers or the concealments that, you know — nobody has talked about case law, and I'm not aware of any so far that really touch upon this in a similar type of situation where somebody has barred discharge based upon a preference payment.

MS. EISEN: That actually is not the part of the Summary Judgment that I would be moving. It's on the concealment of the homestead assets which weren't part of this trial.

THE COURT: Okay.

MS. EISEN: There was a new case that came down on the concealment issue out of Judge Brown's court in William Patrick Cantrell, case number 91-047.

THE COURT: I'm not familiar with it.

MR. FOGO: Your Honor, I did provide for you during our previous Summary Judgment hearings and would bring the Court's attention again to McWinney versus Goodnight, which is a Texas Court of Appeals, 1939 case, albeit several years old.

THE COURT: Folks, I felt real comfortable with what I did on the Motion for Summary Judgment in connection with the homestead. I mean, I challenged that from the very start. That gave me a funny feeling from the outset. But if Judge Brown has done something, I'm interested in it. And if it's on point, I'm interested in it, and feel free to make your, you know, brief, terse, here's something different Motion to Reconsider, and I'll look at it.

MR. FOGO: But it is well established in Texas State Law that every Debtor has -

THE COURT: Don't argue it now, Mr. Fogo. I -

MR. FOGO: Yeah.

THE COURT: I want to read her case first. I think that's really where we start. So you're going to give me a Judgment, and you're probably going to file a Motion to Reconsider before he sends me the Judgment, hopefully.

MS. EISEN: Yeah.

THE COURT: And I'll just do it all at once. If I need a further hearing or want to draw you all back to talk about the Motion to Reconsider, I will. I've got my exhibits. I've made my findings. I'm set. Thank you all. It was very plainly put to me, and I appreciate that.

MS. EISEN: Do you want the original exhibits, Your Honor?

THE COURT: We need to maintain those; yes, ma'am.

MS. EISEN: Yeah.

THE COURT: If you're talking about original copies of documents, I don't need those. Whatever the Witness has been using will serve as the original exhibit. I just need to keep one set. Okay. We'll be in recess until two.

(These proceedings adjourned at 12:20 p.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Linda Levy
Signature of Transcriber

12-6-93
Date

SECTION 727 (11 U.S.C. § 727)

§ 727. Discharge.

(a) The court shall grant the debtor a discharge, unless—

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case—

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case—

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against selfincrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under sections 14, 371, or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under sections 1228 or 1328 of this title, or under sections 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least—

(A) 100 percent of the allowed unsecured claims in such case; or

(B) (i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort; or

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter.

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

(c) (1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.

(2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the debtor to determine whether a ground exists for denial of discharge.

(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if—

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be

property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee; or

(3) the debtor committed an act specified in subsection (a)(6) of this section.

(e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge—

(1) under subsection (d)(l) of this section within one year after such discharge is granted; or

(2) under subsection (d)(2) or (d)(3) of this section before the later of—

(A) one year after the granting of such discharge; and

(B) the date the case is closed.

Bankruptcy Rule References: 1017, 2002, 4004, 4005, 4006, 4008 and 7001

CHAPTER 24. UNIFORM FRAUDULENT TRANSFER ACT

Section
24.001. Short Title.
24.002. Definitions.
24.003. Insolvency.
24.004. Value.
24.005. Transfers Fraudulent as to Present and Future Creditors.
24.006. Transfers Fraudulent as to Present Creditors.
24.007. When Transfer is Made or Obligation is Incurred.
24.008. Remedies of Creditors.
24.009. Defenses, Liability, and Protection of Transferee.
24.010. Extinguishment of Cause of Action.
24.011. Supplementary Provisions.
24.012. Uniformity of Application and Construction.
24.013. Repealed.

This chapter, which consisted of §§ 24.01 to 24.05, was amended by Acts 1987, 70th Leg., ch 1004, § 1, to read as provided for in §§ 24.001 to 24.013.

DISPOSITION TABLE

Showing where provisions of former Chapter 24 are now covered in amended Chapter 24.

Former Sections	Amended Sections
24.01	24.002
24.02(a)	24.006
24.02(b)	24.009
24.03	24.006
24.04	24.013
24.05	24.007, 24.008

24.001. Short Title

This chapter may be cited as the Uniform Fraudulent Transfer Act. --- Amended by Acts 1987, 70th Leg., ch. 1004, § 1, eff. Sept. 1, 1987. --- Application of 1987 Act to transfers made and obligations incurred with respect to its effective date, see note following § 24.007.

§ 24.002. Definitions

In this chapter:

(1) "Affiliate" means:

(A) a person who directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

(i) as a fiduciary or agent without sole discretionary power to vote the securities; or

(ii) solely to secure a debt, if the person has not exercised the power to vote;

(B) a corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor or a person who directly or indirectly owns, controls, or holds, with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

(i) as a fiduciary or agent without sole power to vote the securities; or

(ii) solely to secure a debt, if the person has not in fact exercised the power to vote;

(C) a person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor; or

(D) a person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(2) "Asset" means property of a debtor, but the term does not include:

(A) property to the extent it is encumbered by a valid lien;

(B) property to the extent it is generally exempt under nonbankruptcy law; or

(C) an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant, under the law of another jurisdiction.

(3) "Claim" means a right to payment or property, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(4) "Creditor" means a person, including a spouse, minor, or ward, who has a claim.

(5) "Debt" means a liability on a claim.

(6) "Debtor" means a person who is liable on a claim.

(7) "Insider" includes:

(A) if the debtor is an individual:

(i) a relative of the debtor or of a general partner of the debtor;

(ii) a partnership in which the debtor is a general partner;

(iii) a general partner in a partnership described in Subparagraph (ii) of this paragraph; or

(iv) a corporation of which the debtor is a director, officer, or person in control;

(B) if the debtor is a corporation:

(i) a director of the debtor;

(ii) an officer of the debtor;

(iii) a person in control of the debtor;

(iv) a partnership in which the debtor is a general partner;

(v) a general partner in a partnership described in Subparagraph (iv) of this paragraph; or

(vi) a relative of a general partner, director, officer, or person in control of the debtor;

(C) if the debtor is a partnership:

(i) a general partner in the debtor;

(ii) a relative of a general partner in, a general partner of, or a person in control of the debtor;

(iii) another partnership in which the debtor is a general partner;

(iv) a general partner in a partnership described in Subparagraph (iii) of this paragraph; or

(v) a person in control of the debtor;

(D) an affiliate, or an insider of an affiliate as if the affiliate were the debtor; and

(E) a managing agent of the debtor.

(8) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.

(9) "Person" means an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.

(10) "Property" means anything that may be the subject of ownership.

(11) "Relative" means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.

(12) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance. The term does not include a transfer under a disclaimer filed under Section 37A, Texas Probate Code, or Section 112.010, Property Code.

(13) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

Amended by Acts 1987, 70th Leg., ch. 1004, § 1, eff. Sept. 1, 1987; Acts 1993, 73rd Leg., ch. 846, § 2, eff. Sept. 1, 1993.

Application of 1987 Act to transfers made and obligations incurred with respect to its effective date, see Historical Note following § 24.007.

Section 35(a) of the 1993 amendatory act provides:

"The changes in law made by Sections 1, 2, and 3 of this Act apply only to a disclaimer made on or after the effective date of this Act. A disclaimer made before the effective date of this Act is covered by the law in effect when the disclaimer was made, and the former law is continued in effect for that purpose."

§ 24.003. Insolvency

(a) A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation.

(b) A debtor who is generally not paying the debtor's debts as they become due is presumed to be insolvent.

(c) A partnership is insolvent under Subsection (a) of this section if the sum of the partnership's debts is greater than the aggregate, at a fair valuation, of all of the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.

(d) Assets under this section do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable under this chapter.

(e) Debts under this section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset.

Amended by Acts 1987, 70th Leg., ch. 1004, § 1, eff. Sept. 1, 1987; Acts 1993, 73rd Leg., ch. 570, § 8, eff.£ Sept. 1, 1993. Application of 1987 Act to transfers made and obligations incurred with respect to its effective date, see note following § 24 007.

§ 24.004. Value

(a) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

(b) For the purposes of Sections 24.005(a)(2) and 24.006 of this code, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

(c) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

(d) "Reasonably equivalent value" includes without limitation, a transfer or obligation that is within the range of values for which the transferor would have sold the assets in an arm's length transaction.

Amended by Acts 1987, 70th Leg., ch. 1004, § 1, eff. Sept. 1, 1987; Acts 1993, 73rd Leg., ch. 570, § 9, eff. Sept. 1, 1993.

Application of 1987 Act to transfers made and obligations incurred with respect to its effective date, see note following § 24.007.

§ 24.005. Transfers Fraudulent as to Present and Future Creditors

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or within a reasonable time after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(B) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

(b) In determining actual intent under Subsection (a)(1) of this section, consideration may be given, among other factors, to whether:

(1) the transfer or obligation was to an insider;

(2) the debtor retained possession or control of the property transferred after the transfer;

(3) the transfer or obligation was concealed;

(4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) the transfer was of substantially all the debtor's assets;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Amended by Acts 1987, 70th Leg., ch. 1004, § 1, eff Sept. 1, 1987; Acts 1993, 73rd Leg., ch. 570, § 10, eff. Sept. 1, 1993.

Application of 1987 Act to transfers made and obligations incurred with respect to its effective date, see note following § 24.007.

§ 24.006. Transfers Fraudulent as to Present Creditors

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

Amended by Acts 1987, 70th Leg., ch. 1004, § 1, eff. Sept. 1, 1987.

Application of 1987 Act to transfers made and obligations incurred with respect to its effective date, see note following § 24.007.

§ 24.007. When Transfer is Made or Obligation is Incurred

For the purposes of this chapter:

(1) a transfer is made:

(A) with respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good faith purchaser of the asset from

the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee; and

(B) with respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under this chapter that is superior to the interest of the transferee;

(2) if applicable law permits the transfer to be perfected as provided in Subdivision (1) of this section and the transfer is not so perfected before the commencement of an action for relief under this chapter, the transfer is deemed made immediately before the commencement of the action;

(3) if applicable law does not permit the transfer to be perfected as provided in Subdivision (1) of this section, the transfer is made when it becomes effective between the debtor and the transferee;

(4) a transfer is not made until the debtor has acquired rights in the asset transferred; and

(5) an obligation is incurred:

(A) if oral, when it becomes effective between the parties; or

(B) if evidenced by a writing, when the writing executed by the obligor is delivered to or for the

benefit of the obligee.

Amended by Acts 1987, 70th Leg., ch. 1004, § 1, eff Sept. 1, 987.

Section 2 of the 1987 Act provides:

"This Act applies only to transfers made and obligations incurred by debtors, as determined under Section 24.007, Business & Commerce Code, as added by this Act, on or after

the effective date of this Act Transfers made and obligations incurred before that date are governed by the law in effect immediately before this Act took effect, and that law is continued in effect for that purpose."

§ 24.008. Remedies of Creditors

(a) In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in Section 24.009 of this code, may obtain:

(1) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(2) an attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the applicable Texas Rules of Civil Procedure and the Civil Practice and Remedies Code relating to ancillary proceedings; or

(3) subject to applicable principles of equity and in accordance with applicable rules of civil procedure:

(A) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

(B) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(C) any other relief the circumstances may require.

(b) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

Amended by Acts 1987, 70th Leg., ch. 1004, § 1, eff. Sept. 1, 1987.

Application of 1987 Act to transfers made and obligations incurred with respect to its effective date, see note following § 24.007.

§ 24.009. Defenses, Liability, and Protection of Transferee

(a) A transfer or obligation is not voidable under Section 24.005(a)(1) of this code against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(b) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under Section 24.008(a)(1) of this code, the creditor may recover judgment for the value of the asset transferred, as adjusted under Subsection (c) of this section, or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(1) the first transferee of the asset or the person for whose benefit the transfer was made; or

(2) any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.

(c)(1) Except as provided by Subdivision (2) of this subsection, if the judgment under Subsection (b) of this section is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(2) The value of the asset transferred is not to be adjusted to include the value of improvements made by a good faith transferee, including:

(A) physical additions or changes to the asset transferred;

(B) repairs to the asset;

(C) payment of any tax on the asset;

(D) payment of any debt secured by a lien on the asset that is superior or equal to the rights of avoiding creditor under this chapter; and

(E) preservation of the asset.

(d) (1) Notwithstanding voidability of a transfer or an obligation under this chapter, a good faith transferee or obligee is entitled, at the transferee's or obligee's election, to the extent of the value given the debtor for the transfer or obligation, to:

(A) a lien, prior to the rights of avoiding creditor under this chapter, or a right to retain any interest in the asset transferred;

(B) enforcement of any obligation incurred; or

(C) a reduction in the amount of the liability on the judgment.

(2) Notwithstanding voidability of a transfer under this chapter, to the extent of the value of any improvements made by a good faith transferee, the good faith transferee is entitled to a lien on the asset transferred prior to the rights of a voiding creditor under this chapter.

(e) A transfer is not voidable under Section 24.005(a)(2) or Section 24.006 of this code if the transfer results from:

(1) termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or

(2) enforcement of a security interest in compliance with Chapter 9 of this code.

(f) A transfer is not voidable under Section 24.006(b) of this code:

(1) to the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless the new value was secured by a valid lien;

(2) if made in the ordinary course of business or financial affairs of the debtor and the insider; or

(3) if made pursuant to a good-faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

Amended by Acts 1987, 70th Leg., ch. 1004, § 1, eff. Sept. 1, 1987; Acts 1993, 73rd Leg., ch. 570, § 11, eff. Sept. 1, 1993.

[1] V.T.C A. Bus. & C. § 9.101 et seq.

Application of 1987 Act to transfers made and obligations incurred with respect to its effective date, see note following § 24.007.

§ 24.010. Extinguishment of Cause of Action

(a) Except as provided by Subsection (b) of this section, a cause of action with respect to a fraudulent transfer or obligation under this chapter is extinguished unless action is brought:

(1) under Section 24.005(a)(1) of this code, within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant;

(2) under Section 24.005(a)(2) or 24.006(a) of this code, within four years after the transfer was made or the obligation was incurred; or

(3) under Section 24.006(b) of this code, within one year after the transfer was made.

(b) A cause of action on behalf of a spouse, minor, or ward with respect to a fraudulent transfer or obligation under this chapter is extinguished unless the action is brought:

(1) under Section 24.005(a) or 24.006(a) of this code, within two years after the cause of action accrues, or if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant; or

(2) under Section 24.006(b) of this code within one year after the date the transfer was made.

(c) If a creditor entitled to bring an action under this chapter is under a legal disability when a time period prescribed by this section starts, the time of the disability is not included in the period. A disability that arises after the period starts does not suspend the running of the period. A creditor may not tack one legal disability to another to extend the period. For the purposes of this subsection, a creditor is under a legal disability if the creditor is:

(1) younger than 18 years of age, regardless of whether the person is married; or

(2) of unsound mind.

Amended by Acts 1987, 70th Leg., ch. 1004, § 1, eff. Sept. 1, 987; Acts 1993, 73rd Leg., ch. 570, § 12, eff. Sept. 1, 1993. Application of 1987 Act to transfers made and obligations incurred with respect to its effective date, see note following § 24.007.

§ 24.011. Supplementary Provisions

Unless displaced by the provisions of this chapter, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, [aches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions.

Amended by Acts 1987, 70th Leg., ch. 1004, § 1, eff. Sept. 1, I987.

Application of 1987 Act to transfers made and obligations incurred with respect to its effective date, see note following § 24.007.

§ 24.012. Uniformity of Application and Construction

This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

Amended by Acts 1987, 70th Leg., ch. 1004, § 1, eff. Sept. 1, 1987.

Application of 1987 Act to transfers made and obligations incurred with respect to its effective date, see note following § 24.007.

§ 24.013. Repealed by Acts 1993, 73rd Leg., ch. 570, § 16, eff. Sept. 1, 1993

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
AUG 12 1996
CLERK

No. 96-55

In The

Supreme Court of the United States

October Term, 1995

BAYSHORE NATIONAL BANK OF LA PORTE,

Petitioner,

vs.

DEAN RAY EVANS and JANE ELAINE EVANS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a debtor's intent or motivation, rather than the type of transfer, is the operative element for determining whether a debtor should be discharged under 11 U.S.C. § 727(a)(2)(A).

2. Whether a debtor's intent behind a transfer is inherently an issue of fact which should not generally be subject to disposal by summary judgment.

3. Whether the statutory period of one year under 11 U.S.C. § 727(a)(2)(A) directly conflicts with the statutory period of states' fraudulent transfer statutes such as the Texas Fraudulent Transfer Act, Tex. Bus. & Comm. Code § 24.001 *et seq.* (Vernon 1993).

4. Whether an equitable lien can be imposed on an exempt homestead when a debtor, with an intent to hinder, delay or defraud creditors, transfers all of his non-exempt assets into that exempt homestead.

LIST OF PARTIES

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Dean Ray Evans and Jane Elaine Evans ("Respondents") request that this Court deny the petition for writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this case on February 7, 1996.

STATEMENT OF THE CASE

This is a bankruptcy discharge case decided under Texas law.

This is a no evidence and insufficient evidence case which is not appropriate for certiorari review. Sup. Ct. Rule 10.

Petitioner is a lending bank which loaned money to a Texas corporation, Men, Inc. Men, Inc. operated a convenience store located in La Porte, Texas. Respondents are a husband and wife who were required by the lending bank to join the corporate borrower in the execution of a bank note in order for the convenience store to receive a bank loan. The respondents brought suit against the lending bank under theories of lender liability as well as facts which relate to bank tying act violations. The convenience store failed. The lending bank filed a counter suit for the unpaid corporate debts. There was no evidence that the respondents personally received the borrowed funds made the subject of the bank's claim for relief.

According to respondent D. Evans' testimony at trial, after four years of litigation and without written or actual notice to the respondents, his attorney entered into a

consent judgment with the petitioner. The consent judgment provided that respondents take nothing against the lending bank but limited the lending bank's recovery to the dollar amount of the original debt, saving the respondents interest and attorney fees.

During the period of this litigation, the respondents bought and sold personal property and real property in the course of their ordinary affairs. The respondents acquired and designated one property as a residential homestead in accordance with state law more than one year prior to their debt relief case.

The respondents' real estate transactions were recorded in the public deed records in accordance with state law at the time of each sale and purchase.

Stock sales and other transactions including a land purchase were conducted under ordinary commercial terms in which checks, receipts and written instruments detailed the transactions.

The respondents sought relief under Title 11, Chapter 7 of the bankruptcy code on November 19, 1991 following the commencement of post judgment collection proceedings by the petitioner.

The respondents disclosed the existence of two cashier checks in the amount of $11,000.00 and $22,000.00 in the debt relief schedules. These cashier checks were tendered along with their deposits to the issuing bank, Texas Coastal Bank as the result of prior unpaid debts due to that bank. Texas law provides a legal priority for Texas Coastal Bank and in the absence of bankruptcy relief, this claim would have been superior to petitioner's claim. The

respondents had unpaid debts due to Texas Coastal Bank in the approximate amount of the cashier checks and deposit accounts at the time the checks were tendered to Texas Coastal Bank.

The proceeds from the cashier checks were paid to the respondents' trustee in bankruptcy in a preference compromise between Texas Coastal Bank and the trustee.

The respondent, Dean Ray Evans, was an outside member of the board of directors for Texas Coastal Bank at the time of the return of the two cashier checks. He was not involved in bank operations or transaction management in the day-to-day business of the bank. He held a position of trust and responsibility for Texas Coastal Bank to review bank lending policy.

Petitioner objected to the respondents' general discharge, sought to have its debt determined non-dischargeable and made an extraordinary claim that an equitable lien be placed on the respondents' Texas homestead and that the bank be allowed to sell the respondents' homestead to satisfy what the trial court determined was a dischargeable debt resulting from a civil judgment.

The bankruptcy trial court rendered a final judgment that petitioner take nothing, ordered a discharge, denied all relief for Bayshore National Bank of La Porte. Upon appeal by the petitioner, the district court for the Southern District of Texas affirmed the bankruptcy trial court.

On further appeal to the Fifth Circuit Court of Appeals and after oral argument, the circuit court

affirmed the district court in a terse three page per curiam opinion by Circuit Judges King, Davis and Barksdale.

The circuit court determined the record supported the findings by the trial court and petitioner had failed to submit sufficient summary judgment evidence of an intent to conceal and because the transaction complained of did not occur within one year of the respondents' bankruptcy filing, the district court did not err in affirming the bankruptcy court's summary judgment. The circuit court determined the record in the trial court, supported the trial court's granting of a general discharge. Per Curiam Opinion, Fifth Circuit Court of Appeals, King, Davis, Barksdale, Circuit Judges. Petitioner's Appendix, pp. 1, 2, and 3.

The circuit court's determination is precedent under the limited circumstances of Local Rule 47.54, Fifth Circuit Court of Appeals.

REASONS FOR DENYING WRIT OF CERTIORARI

This is a debt relief discharge case decided under Texas law. The petition presents four questions. Numbers one and two involve a factual issue of intent and relate to federal law only because they are fact driven in the context of a bankruptcy discharge case. Questions one and two are the result of insufficient evidentiary proof by the petitioner at the pre-trial summary judgment stage and the lack of sufficient evidence submitted at the trial stage of the case to meet the petitioner's burden of proof.

Two questions, numbers three and four, involve the interpretation of Texas law. The questions composed by the petitioner were not addressed by the circuit court in reaching its decision since resolution of the questions was not necessary to the outcome of the case. For this reason, in addition to the basis more fully expanded upon below, the petition for writ of certiorari in this matter should be denied.

1. Questions One and Two Are Not Proper For Further Review or Are Not Properly Presented For Review.

Petitioner presents two questions involving intent by the respondent, D. Evans, in relation to the purchase of a homestead and two cashier checks accounted for to the bankruptcy trustee and tendered to Texas Coastal Bank. However, neither of these questions was addressed by the circuit court in reaching its decision.

This is not surprising for the following reasons:

(i) Petitioner failed to properly or successfully raise its questions involving facts of the case on appeal to the district court or the circuit court. *Bayshore v. Evans*, per curiam (5th Cir. 1996). Petitioner's Appendix, pp. 1, 2, 3. District Court Order, pp. 4 and 5.

(ii) Petitioner failed to meet the burden of proof this court specified for plaintiffs in dischargeability cases, *Grogan v. Garner*, 498 U.S. 279 (1991), and when confronted with a summary judgment motion by a defendant. *Celotex v. Catrett*, 477 U.S. 317 (1988).

(iii) Petitioner failed at trial to meet the burden of proof required for the relief requested.

In order to determine if summary judgment was proper in this case, each court has been required to interpret and apply both Texas law and United States bankruptcy laws. Issues of law were reviewed on a de novo standard. Issues of fact were examined on a clearly erroneous standard in accordance with current law.

At the time of the trial of this case, petitioner failed to meet the burden of proof for non-dischargeability of its debt or a discharge denial as the result of the cashier check transaction characterized by the trial court as preferential.

Petitioner provided insufficient evidence or no evidence for the relief requested.

Given the points of error presented to the circuit court, the following statement in its opinion provides no basis for discretionary review by this court:

> " . . . because we find that Bayshore did not submit sufficient summary judgment evidence as to the Evans' intent to conceal the transfer or to hinder, delay or defraud and because the transfer did not occur within one year of the Evans' bankruptcy filing, we conclude that the district court did not err in affirming the bankruptcy court's summary judgment . . . After a trial on the merits the bankruptcy court found that D. Evans' transfer of the cashier checks was a preferential payment and not a transfer made to hinder, delay or defraud creditors. The record supports that finding." *Per curiam*, 5th Cir. 1996, Petitioner's Appendix pp. 1, 2 and 3.

The basis expressed by the circuit court to affirm the district court and the trial court establishes that the questions presented by petitioner (Petition, page i) were not relevant in the disposition of the case.

A review of the circuit court and trial court determinations demonstrates that the case was decided on factual grounds to which proper legal standards were applied.

In this regard, petitioner did not appeal to the circuit court on the clearly erroneous standard a material fact finding made by the trial court, but rather argued that the trial court misapplied the law to the facts.

Not recognizing this flaw, petitioner argues that the denial of the extreme relief requested has resulted in a departure from existing law and that this court should therefore exercise its supervisory powers. Petition, p. 18.

The flaw in this type of argument is apparent. The intent questions on which petitioner seeks review were not addressed by the circuit court and, therefore, are not properly presented for determination given the legal and factual record for this case.

The legal standard affirmed on appeal by the circuit court on the issues of intent complained of by the petitioner are only the legal result of the failure of the petitioner to meet the burden of proof in the trial court for the relief requested.

2. Question Three and Four Presented by Petitioner Deal With Properly Applied State Law and Matters Pre-Empted by Federal Bankruptcy Law.

Questions number three and four asserted by petitioner deal with the interpretation of state law and the legal result of federal preemption in bankruptcy matters. Petitioner argues in question number three that there is a conflict between 11 U.S.C. § 727(a)(2)(A) and Texas Fraudulent Transfer Act, Tex. Bus. & Commerce Code, § 24.001, *et seq.* (Vernon's 1993). *See*, Petition Question 3, pp. i, 22.

Petitioner argues in question number four that it was deprived by the trial court of a state law remedy for an equitable lien to be imposed on a Texas homestead. Petitioner failed to demonstrate to the trial court by admissible evidence that it was legally entitled to an equitable lien on exempt property under Texas law.

This Court stated in *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944), "ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Id; see also Virginia v. American Booksellers Assn.*, 484 U.S. 383, 395 (1988). "This Court rarely reviews a construction of state law agreed upon by the two lower federal courts".

Supreme Court Rule 10 instructs practitioners that the interpretation of state law and issues of fact are not suitable for discretionary review by the Court except in the most unusual circumstances. There are no unusual circumstances in this case. In the present case, petitioner brings two questions involving Texas law, yet does not

show that state law was misapplied and not subject to preemption by federal bankruptcy law.

3. Corrections Of Misstatements In The Petition.

Pursuant to Sup. Ct. Rule 15.1, the following misstatements are brought to the Court's attention.

Petitioner misstates the bankruptcy court's findings when it recites the trial judge found that respondent Evans had an intent to defraud, hinder or delay his creditors. Petitioner further misstates the record when it alleges that the circuit court has misrepresented the findings of the bankruptcy court. Petition page 17.

The petitioner argues that the circuit court decision is erroneous and conflicts with *International Shortstop,* 838 F.2d 1257 (5th Cir. 1991) and *In re Oliver,* 819 F.2d 550 (5th Cir. 1987). The decisions in *International Shortstop* and *Oliver* have little or no application to the facts of this case. Petitioner argued there was a continuing concealment and that the respondent D. Evans' preference payment was fraudulent to delay or hinder creditors. The trial court did not make such a finding. Petitioner failed to meet the burden of proof in the trial court for the relief requested.

Petitioner did not raise a conflict of law argument in the trial court, the district court or to the circuit court. Each reviewing court determined that the petitioner failed to establish that the transactions decided by summary judgment occurred within the statutory time period of one year specified by 11 U.S.C. § 727(a)(2)(A) or were concealed.

The circuit court merely made the uncontroversial determination that petitioner failed to provide sufficient evidence of concealment and a debtor cannot be denied a discharge for transfers which did not take place during the one year period specified by 11 U.S.C. § 727(a)(2)(A).

Petitioner conceded the transactions complained of occurred more than one year prior to the commencement of the debt relief case, but argued there was a concealment of the transactions. Petitioner failed to provide sufficient evidence in the trial court to prove concealment.

There is no conflict between the bankruptcy code and Texas Business & Commerce Code § 24.001, *et seq.*, Petitioner's Appendix, pp. 35-50, and if a conflict does exist, the Texas statute is pre-empted in accordance with long standing supremacy standards of federal bankruptcy law.

The supremacy clause requires courts to follow federal not state law in the context of constitutionally provided legal relief. U.S. Const. Art. VI Cl. 2, *see, Barret Bank v. Nelson*, 517 U.S. ___, 134 L.Ed.2d 237, 116 S.Ct. ___ (1996), the most recent case from this court reviewing the federal preemption doctrine.

The respondents' transactions involving real property were recorded and filed of record in accordance with state law.

Texas law recognizes concealment in the context of pretended transfers. There was no evidence of the use of a "straw man" or a pretended transfer of any asset.

Texas law recognizes the remedy of constructive trust or equitable lien when the creditor traces the funds loaned into the purchase of exempt property. There was

no evidence any funds borrowed from the petitioner were used to purchase the exempt homestead or the cashier checks accounted for in the bankruptcy case.

There is no remedy of an equitable lien on exempt property provide by Title 11, Section 727. *See*, Petitioner's Appendix pp. 31, 32, 33, 34.

There is no remedy or relief under the Texas Fraudulent Transfer Act, Tex. Bus. & Comm. Code § 24.001, *et seq.*, Petitioner's Appendix pp. 35-50 to which petitioner demonstrated by admissible evidence that it was entitled.

Petitioner's evidence was insufficient for the relief requested.

Petitioner fails to properly present any Texas authority inconsistent with the circuit court's interpretation of the statutes at issue. *See*, Title 11, Sec. 727, Petitioner's Appendix, pp. 31, 32, 33, 34. The two questions concerning Texas law set forth in the petition were not reached by the district court or the circuit court and are not appropriate for review by this Court.

4. No Basis Is Shown To Grant Petitioner Discretionary Review

There is no broad policy basis for review by this court. There is no important question of federal law. There is no departure from existing law that warrants the court to exercise its supervisory powers. There is no federal question that has been decided in a way that conflicts with decisions of the courts of appeals on the same question.

Petitioner failed in the trial court to meet the burden of proof for the relief requested.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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